IN RE SARJIT SINGH KHAIRA & IN RE THE PUBLIC SERVICE COMMISSION, SARAWAK

HIGH COURT SABAH & SARAWAK, KUCHING
MOHD. NOOR AHMAD J
[ORIGINATING SUMMONS NO. KG. 275 OF 1989]
1 SEPTEMBER 1990

ADMINISTRATIVE LAW: *Certiorari - Whether proper procedure should be by originating motion or originating summons - Rules of High Court 1980, O. 2 r. 2(2), O. 3 r. 5, O. 5 r. 3, O. 53 r. 1A - Courts of Judicature Act 1964, s. 73.*

On 14 December 1988 the State Public Service Commission decided to dismiss the applicant from his service. The decision was communicated to him on 27 December 1988. On 4 February 1989, the applicant filed an *ex parte* notice of motion for leave to apply for an order of *certiorari* for the purpose of having the said decision quashed. Leave was granted on 13 March 1989 but when the motion was heard on 4 July 1989, a preliminary objection was raised contending that the application for leave was out of time. The preliminary objection was upheld. The applicant's Counsel applied orally for extension of time but this was not considered because it was not properly made. The motion was therefore dismissed and an appeal was made to the Supreme Court, which appeal was also dismissed. The Supreme Court held that the relevant date for the purpose of O. 53 r. 1A was 14 February 1988 (the date of the decision to dismiss the applicant) and not 27 December 1988 (the date the decision was communicated to the applicant).

The applicant now applies for an extension of time. The respondent opposed the application on several grounds, including irregularity, inordinate delay and *res judicata.*

Held:

[1] The applicant had adopted the correct mode in making the application; even if the Court is wrong, as the respondent had not applied to set aside the application on the grounds of irregularity as required by O. 2 r. 2(2), it is now too late to raise this objection.

[2] The delay has not been inordinate and has been accounted for to the satisfaction of the Court.

[3] The issue of extension of time had not been raised before the Supreme Court nor was it in the memorandum of appeal. The Court is satisfied that the conditions for an estoppel to arise upon *res judicata* have not been fulfilled.

[Leave given to applicant to apply for certiorari.]

Cases referred to:

Ong Guan Teck & Ors. v. Hijjas Kasturi [1982] CLJ (Rep) 616
Haji Wan Habib Syed Mahmud v. Datuk Patinggi Hj. Abdul Taib Mahmud & Anor. [1986] CLJ (Rep) 149
Inland Revenue Commissioner v. Sneath [1932] 2 KB 362

Legislation referred to:

Rules of the High Court 1980, O. 53 r. 1A, O. 2 r. 2(2), O. 5 r. 3, O. 3 r. 5

Other sources referred to:

Society of Medical Officers of Health, [1959] QBD 462 at 481

For the applicant - T.O. Thomas; M/s. Thomas & Co.
Abdul Halim bin Hj. Sabil; Pemangku Peguam Besar Negeri

JUDGMENT

Mohd. Noor Ahmad J:

In this originating summons the applicant applied for an extension of time to apply for leave to apply for an order of *certiorari* to remove into this Court, for the purpose of being quashed, the decision of the State Public Service Commission, Sarawak, made on 14 December 1988 which dismissed the applicant from the State Civil Service.

The background leading to this application is briefly as follows:

(1) On 14 December 1988, the State Public Service Commission decided to dismiss the applicant. The decision was communicated to the applicant on 27 December 1988 but the applicant was informed of the date of the decision only on 1 July 1989.

(2) On 4 February 1989, the applicant filed an *Ex Parte* notice of motion for leave to apply for an order of *certiorari* for the purpose of having the said decision quashed. On 13 March 1989 leave was granted and when the motion (OM No. Kg. 4 of 1989) was heard before Haidar J on 4 July 1989, the learned Deputy State Attorney-General raised a preliminary objection contending that the applicant's application for leave to apply for an order of *certiorari* was out of time by 10 days. The preliminary objection was upheld. The applicant's Counsel applied orally for extension of time but was not considered because it was not properly made. The motion was dismissed.

(3) The applicant appealed to the Supreme Court. The appeal was dismissed on 20 November 1989. The Supreme Court held that the relevant date for the purpose of O. 53, r. 1A, was the date when the State Public Service Commission made the order of dismissal (i.e., 14 December 1988) and not the date of the letter by which the decision was communicated to the applicant, as held by the Court below (i.e., 27 December 1988).

(4) The applicant filed the present application on 8 December 1989.

(1) The learned Deputy opposed the application on the following grounds:

(a) The application is irregular.

(b) There has been an inordinate delay on the part of the applicant in making the application.

(c) The Court is *functus officio*.

(d) The Court has no jurisdiction to hear the application because of *res judicata*.

(2) At the hearing in Chambers, I allowed the applicant's application and ordered the applicant to file the application for leave to apply for an order of *certiorari* within 4 weeks from the date of the order. However, the learned Deputy applied for further argument in open Court and was granted.

Now, I will deal with the grounds raised by the learned Deputy:

(1) With regard to ground (a), the learned Deputy contended that the application in relation to a *certiorari* proceeding should have been made by way of originating motion instead of by originating summons. In my view, having regard to the provisions of O. 5, r. 3, and O. 3, r. 5, of the Rules of the High Court 1980, the applicant had adopted the correct mode. Even if I am wrong, as the learned Deputy had not applied to set aside the applicant's application on the ground of irregularity, as required by O. 2, r. 2(2), especially so when he has already filed his affidavit-in-opposition on 14 April 1990, it is now too late for him to raise this objection. Therefore, this ground has no merit.

(2) In respect of ground (b), the learned Deputy contended that there was an inordinate delay of about 10½ months on the part of the applicant in making this application. The State Public Service Commission made the dismissal order on 14 December 1988 and for the purpose of O. 53, r. 1A, the application for leave should have been made by 25 January 1989, but the present application was filed only on 8 December 1989. Further he insisted that, in view of the provisions of s. 73 of the Courts of Judicature Act 1964 and O. 56, rr. (1) and (4), as the applicant failed to apply for stay of execution of the decision of Haidar J made on 4 July 1989, the present application should not be entertained. The cases of *Ong Guan Teck & Ors. v. Hijjas* Kasturi [1982] 1 CLJ (Rep) 616 and *Haji Wan Habib Syed Mahmud v. Datuk Patinggi Hj. Abdul Taib Mahmud & Anor.* [1986] CLJ (Rep) 149 were cited in support thereof. My view is that, two issues will have to be considered in this application. Firstly, whether the 10-day delay on the part of the applicant in applying for leave to apply for an order of *certiorari* (see para. 2(2) above) has been accounted for to the satisfaction of the Court? Secondly, whether there has been a delay in applying for extension of time and if so, whether the delay is inordinate? On the first issue, I am of the opinion that the delay is not inordinate and has been accounted for to the satisfaction of the Court. The explanation for the delay is contained in paras. 14 to 19 of the affidavit of Sarjit Singh Khaira affirmed on 7 December 1989. In a nutshell, the reasons for the delay are as follows:

(i) He was in a poor state of health and depressed, which is supported by medical evidence.

(ii) He could not instruct his lawyer to commence proceeding earlier due to financial difficulties.

(iii) The State Public Service Commission contributed to the delay by not communicating the decision to dismiss him as soon as possible by only after 13 days later and further, the actual date of the decision was not divulged to him until six months had lapsed.

With regard to the second issue, I am of the view that when the appeal was pending before the Supreme Court, the applicant could not be expected to apply for an extension of time because the applicant was then still contending that he was within time. The Supreme Court made its decision on 20 November 1989 and the present application was filed 18 days later. In my view, the 18-day delay is not inordinate. Nothing should be construed against the applicant for not applying for stay of execution of the decision of Haidar J because, to my mind, an application for stay of execution is not imperative in every case of appeal and further, on the facts, there was no necessity for the applicant to apply for stay of execution as he was not threatened with execution of any sort. Therefore, this ground also has no merit.

(3) In the case of ground (c), the learned Deputy contended that an oral application for extension of time was made before Haidar J but was refused on the ground that it was not made in proper manner. Therefore, as the matter had been decided by another Judge of equal jurisdiction, this Court is *functus officio*. With due respect, such contention is untenable having regard to the record of proceedings before Haidar J. It is manifestly evident from the judgment that the oral application for extension of time was not entertained by Haidar J and the issue of delay, including the applicant's explanation for the delay, was never canvassed before the Court. In other words, Haidar J did not consider the issue of delay at all.

(4) With regard to ground (d), the learned Deputy contended that as the appeal against Haidar J's decision (which, *inter alia*, refused the applicant's application for extension of time) had been dismissed by the Supreme Court, this Court is estopped from hearing the present application on the principle of *res judicata*. With due respect, this contention is also untenable having regard to the record of proceedings before the Supreme Court. It is evidently clear that there was no appeal touching the extension of time, nor was the issue of extension of time raised before the Supreme Court and nor was it in the memorandum of appeal. The Supreme Court merely decided on the construction of the words '... within 6 weeks after the date of the proceeding ...' in O. 53, r. 1A, based on the facts of the case. Having regard to the circumstances of the case, I conclude that the following conditions for an estoppel to arise upon *res judicata* have not been fulfilled:

> There must be a *lis inter partes* in which the point relied upon for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the Court." (Per Lord Hanworth MR in *Inland Revenue Commissioner v. Sneath* [1932] 2 KB 362).
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> But neither the judgment of a concurrent or exclusive jurisdiction is evidence (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment'. "(Lord Justice Morris in *Society of Medical Officers of Health* [1959] QBD 462 at 481 quoted the passage from the judgment of Chief Justice De Grey in *Duchess of Kingston's* case).

In the circumstances and for the aforesaid reasons, the earlier order that I made in chambers is hereby affirmed. (i.e., the application for leave to apply for *certiorari* must be filed within 4 weeks from today). Cost is to be in the cause.

Also found at [1990] 2 CLJ 787